BOARD OF ALIEN LABOR CERTIFICATION APPEALS
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

DATE: December 8, 2000

CASE NO: 1997-INA-91

In the Matter of:

TOO MAC ENGINEERING.
Employer,

On Behalf of:

ILYA GRINBLAT
Alien

Appearance: Elieser Kapuya, Esq.
Los Angeles, California
for the Employer and the Alien

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Ilya Grinblat ("Alien") filed by Employer Too Mac Engineering ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California denied the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely

affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 CFR § 656.27(c).

STATEMENT OF THE CASE

On July 18, 1995, the Employer filed an amended application for labor certification to enable the Alien to fill the position of Maintenance Machinist in Employer's Machine Shop. The duties of the job offered were described as follows:

> "Will set up and operate a variety of machine tools. Will fit and assemble parts to fabricate or repair machine tools and maintain industrial machines applying knowledge of mechanics, shop mathematics and machining procedures. Will diagnose malfunctions and determine need for adjustment or repair. Will use hand and power tools to examine parts for defects and for possible replacement or repair. Will use hand and power tools to examine parts for defects and for possible replacement or repair. Will Insure the machines are properly calibrated and working as needed."

Education in Mechanical Engineering was required, and 2 years experience or school training. Supervise no employees and report to owner. Salary was $3,040.00 per month. 21 applicants were referred by the State employment agency. (AF-29-184)

On March 19, 1996, the CO issued a NOF denying certification, finding that at least two of these 21 U.S. applicants were rejected without benefit of interview even though they were at least as well qualified as alien was at time of hire. The CO also found Employer did not demonstrate a good faith effort to contact applicants in a timely fashion since the Job Service sent resumes on April 17, 1995, but the efforts to contact applicants did not take place until May 4, 1995. The CO

required documentation that the applicants were interviewed or attempts made. “Unavailability of the employer is not an acceptable justification for delay in contacting U.S. workers.” (AF-26-27)

Employer on March 19, 1996, forwarded its rebuttal, alleging that the two applicants in question, Armando Arriola and Steve Banchich, had been repeatedly contacted but would not respond. The companies they had listed on their resumes did not exist. Employer, also, forwarded a receipt from the post office showing 21 certified mail payments, dated April 25, 1995 at 9:24 A.M., which employer stated was three or four working days after receipt of the resumes from the Job Service. A letter of May 23, 1995 to the CO gave the results of eight attempted or actual interviews with results that disqualified them for one reason or another from employment with Employer. The other 13 Employer alleged never contacted Employer (AF-20-25)

On May 2, 1996, the CO issued a Supplemental NOF, requiring Employer to “Submit proof that the employer contacted each and everyone of the alien’s past employers. Also submit proof that he has verified prior employment on all current employees.” (AF-18-19)

On May 22, 1996, S. Berson, Owner of Employer stated with respect to verifying work experience:“Mr. Ilya Grinblat submitted the Labor Book, an official document issued and certified by the employer and where it shows the dates and places that he worked. In the Soviet Union this document is very important in order to qualify for the job. Along with the Labor Book, a certificate as the Best Inventor-Rationalizer of the USSR was presented. Besides the above documents, Mr. Grinblat was recommended to me by Mr. Vladimir Verny who is working as an engineer-mechanic of high qualification for Senior Tool Engineering Pacesetter, Inc. And has been acquainted with Mr. Grinblat’s job since living in the Soviet Union...” Attached was a xeroxed copy of what purported to be the Labor Book, in Russian, consisting of 5 pages, with an English translation summary by Inna Traytel, dated May 30, 1992. (AF-10-17)

On July 18, 1996, the CO issued a Final Determination, denying certification. After summarizing the NOF, rebuttal and Supplemental NOF, the CO stated: “Discussion. Although the employer’s rebuttal attempted to respond to the issues raised in the NOF, there was not true or substantial documentation to back up the claims. The employer has not proven that he obtained verification on alien’s prior work history prior to hire. The documents submitted are only copies, which do not have the

original signatures. Therefore, the employer can not disqualify the two U.S. applicants, Mr. Arriola and Mr. Banchich for not being able to verify their employment history?”“Conclusion. The employer has failed to provide convincing documentation to prove that the employer did verify alien’s work history. Therefore, it is held that the employer did not comply with the corrective action required by the CO. The application for labor certification is denied.” (AF-6-9)

Employer, August 3, 1996 requested review of the Final Determination. (AF-1-5)

Discussion

The regulations provide in 656.21(b)(6) that if U.S. workers have applied for the job opportunity, an employer must document that they were rejected solely for lawful, job-related reasons. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. workers. Therefore, an employer must take steps to ensure that it has rejected U.S. applicants only for lawful, job-related reasons. The employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. Cathay Carpet Mill, Inc., 1987-INA-161 (Dec. 7, 1988)(en banc).

Section 656.25(e) provides that the Employer’s rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 1988-INA-313 (1989); Belha Corp., 1988-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 1992-INA-321 (Aug. 4, 1993) On the other hand, where the Final Determination does not respond to Employer’s arguments or evidence on rebuttal, the matters are deemed to be successfully rebutted and are not in issue before the Board. Barbara Harris, 1988-INA-32 (April 5, 1989)

As a practical matter, we note that 21 applications were initially received for this job opportunity which did not require a college degree and required only two years experience. Employer's mere assertions, however, on rebuttal that 8 applicants were either not qualified, were not available or were for some other reason unable to work for employer, was not challenged by the (acting) CO, either in her Supplemental NOF or Final Determination. Similarly the documentation concerning the other 13 applicants that did not reply to Employer’s certified letter was not challenged by the CO. Under these circumstances, we find the CO has accepted Employer’s rebuttal on these issues.

See, Harris, supra. While not ruling on the matter, we find that the CO was within her authority to accept the documentation as sufficient. Further, there was no prima facie reason why we should find Employer's documentation and arguments on these issues was not sufficient rebuttal. In that connection, we are somewhat nonplussed as to what the CO meant in her Final Determination by stating the Employer did not make true or substantial documentation to back up its claims in response to the issues raised at the NOF. However, this is in the "Discussion" section of the Final Determination. Moreover, the next sentence would appear to clarify that the only issue the CO used as a basis for denial of labor certification is that the employer did not document alien's work history prior to hire since it did not have original signatures. Further, the only reason given for denial in the CO's conclusion is that employer did not verify alien's prior work history.

We believe the CO erred in several respects. We infer from the CO's rulings rather than actual statement, that documentation of alien's prior work history was required by the CO to demonstrate that more was required of the rejected two U.S. Applicants Arriola and Banchich than was required of alien. This is not a standard recognized by this Board. The only requirement of alien's experience is that it qualify him for the job opportunity; absent other circumstances not here evident, whether employer obtained an employment history is irrelevant. This is particularly true where as here this new issue has been injected in a supplemental NOF rather than the original NOF. Further, we find that arguendo were documentation required, Employer has provided such. The documents dated in 1992, well before the application for certification, appear valid with appropriate seals and entries of work experience. The CO has not explained why she finds this documentation not "convincing". Written assertions which are reasonably specific and indicate their sources or bases shall be considered documentation which then must be given the weight they rationally deserve in making the relevant determination. Gencorp, 1987-INA-659 (Jan. 13,1988)(en banc).

Since the CO's only basis for denial was rebutted by Employer, we will not consider other issues previously raised. Drs. Presig & Alpern, 1990-INA-35 (Oct. 17, 1990); Hunter's Inn, 1995-INA-278 (Feb. 19, 1997).

ORDER

The Certifying Officer's denial of labor certification is REVERSED. This matter is remanded for granting certification.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: **Alice M. Synnott**
(Claudia Olivera)

Case No. : 95-INA-235

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: